

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8508;
Ruling Date: August 17, 2007; Ruling #2008-1740; Agency: Department of
Corrections; Outcome: Grievant not in compliance. Hearing Decision in
Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2008-1740
August 17, 2007

The grievant has requested that this Department administratively review the hearing officer's decisions in Case Number 8508. For the reasons set forth below, this Department will not disturb the hearing officer's decision in this case.

FACTS

As most of the procedural and factual history of this case is irrelevant to this decision, only the pertinent facts will be mentioned here. On July 11, 2007, the hearing officer issued his fourth reconsideration decision in Case No. 8508.¹ On July 12, 2007, the grievant requested an administrative review from this Department based upon the hearing officer's findings and conclusions in that July 11th decision. This request for administrative review is discussed below.

¹ Four reconsideration decisions in one case is not typical. Here, however, after the hearing officer issued his first reconsideration decision, the grievant, within the required 15 calendar day period, sought another reconsideration decision based on what the grievant asserted was newly discovered evidence that warranted mitigation of his discipline. In his second reconsideration decision, the hearing officer refused to address the grievant's second request for reconsideration, claiming he lacked jurisdiction to do so. This Department subsequently ruled that the hearing officer had jurisdiction to consider the second request and ordered the hearing officer to issue a third reconsidered decision. The hearing officer issued a third reconsideration decision, but as set forth in EDR Ruling ## 2007-1563, 2007-1637 and 2007-1691, failed to state whether the evidence in question (1) was newly discovered, and (2) warranted mitigation. In his fourth reconsideration decision, the hearing officer addressed those two issues. For a full recounting of the facts and procedural history in this matter, see Case Number 8508 and EDR Ruling #2007-1556 and EDR Ruling ## 2007-1563, 2007-1637 and 2007-1691. These rulings and appeals can be found by using the search feature on EDR's Website at <http://www.edr.virginia.gov>.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure.”² If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, this Department does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.³

Mitigation

The grievant challenges the hearing officer’s failure in his fourth reconsideration decision to find Officer M’s statement to be “newly discovered evidence” that would warrant mitigation of the disciplinary action taken against him. The grievant is essentially asking this Department to issue an administrative review on the same issues explored in EDR Ruling ##2007-1563, 2007-1637 and 2007-1691 and to find the hearing officer noncompliant with the orders set forth in that ruling. While the grievant may disagree with the hearing officer’s conclusions in his fourth reconsideration decision, we find that the hearing officer complied with this Department’s June 29th ruling in that he clarified his earlier decision as to whether Officer M’s statement was “newly discovered” and as to whether such statement warranted mitigation of the discipline. Accordingly, this Department has no basis to rule that the hearing officer has failed to comply with the order to consider the mitigation issue.

Alleged Bias

The grievant also claims that the hearing officer’s findings and conclusions in the grievances of other employees, Case Nos. 8491 and 8493, prejudiced the hearing officer when determining the appropriate outcome of the grievant’s case on reconsideration.⁴ Case Nos. 8491 and 8493 were issued approximately two months after issuance of the grievant’s February 2, 2007 original hearing decision.

² Va. Code §§ 2.2-1001(2), (3), and (5).

³ *Grievance Procedure Manual* §§ 6.4; 7.2.

⁴ The hearing officer in the grievant’s case was the same hearing officer that decided Case Nos. 8491 and 8493, which, like the grievant’s case, involved discipline for improper counting of inmates and falsifying records regarding the counting of inmates. *See* Decision of Hearing Officer, Case No. 8491, issued April 2, 2007 and Decision of Hearing Officer, Case No. 8493, issued April 2, 2007. The hearing officer upheld the discipline in both Case No. 8491 and Case No. 8493, and as such, the grievant argues that these two cases negatively influenced the hearing officer when deciding whether to mitigate the discipline against the grievant during the administrative review phase of his case.

The grievant's claims of hearing officer bias are untimely. Administrative reviewers, i.e., the hearing officer, the Director of this Department, and the Director of the Department of Human Resource Management (DHRM), do not have the authority or jurisdiction to consider evidence that is discovered outside of the mandated 15 calendar day period for filing requests for administrative review.⁵ If administrative reviewers were allowed to address evidence discovered after the 15 calendar day period has expired, the finality of the grievance process would be severely hindered. And while the grievance procedure's appeal framework was never intended to impede administrative reviewers from carrying out their statutory obligations, if the administrative review process were open-ended, allowing for multiple (revised) opinions based on evidence discovered outside of the 15 calendar day period, the judicial appellate process would be derailed through the loss of a clear, defined point at which hearing decisions becomes final and ripe for judicial appeal. Similarly, the process for seeking implementation of a final hearing decision would be thwarted by the absence of any definitive point at which decisions could be considered final and ripe for petition.⁶ Accordingly, the grievant's claim that the hearing officer's decisions in Case Nos. 8491 and 8493 biased the hearing officer in determining the grievant's case on reconsideration will not be administratively reviewed by this Department.

We are also compelled to note that even if the grievant's request for administrative review were timely, there does not appear to be any evidence of hearing officer bias in this case. The Virginia Court of Appeals has indicated that as a matter of constitutional due process, actionable bias can be shown only where a judge has a "direct, personal, substantial, pecuniary interest" in the outcome of a case.⁷ While not dispositive for purposes of the grievance procedure, the Court of Appeals test for bias is nevertheless instructive and has been used by this Department in past rulings.⁸ In this case, the grievant has not claimed nor presented evidence that the hearing officer had a direct, personal, substantial, pecuniary interest in the outcome of the grievance. Accordingly, this Department cannot conclude that the hearing officer's alleged actions, even if true, demonstrated bias in this case.

⁵ See e.g., EDR Ruling #2007-1576 (a hearing officer does not have jurisdiction to address a request for administrative review based on newly discovered evidence when the request is received after the expiration of the 15 calendar day administrative appeal period).

⁶ Va. Code § 2.2-3006 (C) states "[t]he hearing officer's final decision shall be effective from the latter of the date issued or the date of the conclusion of any administrative review and judicial appeal, and shall be implemented immediately thereafter, unless circumstances beyond the control of the agency delay such implementation." Section 2.2-3006 (D) states "[e]ither party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final decision or recommendation of a hearing officer." Va. Code § 2.2-3006 (D).

⁷ *Welsh v. Commonwealth*, 14 Va. App. 300, 315, 416 S.E. 2d 451, 459 (1992) (alteration in original).

⁸ See, e.g., EDR Ruling No. 2007-1523; EDR Ruling No. 2004-640 and EDR Ruling No. 2003-113.

APPEAL RIGHTS AND OTHER INFORMATION

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.⁹ Accordingly, the hearing officer's decision becomes final with the issuance of this administrative review. Thus, within 30 calendar days of this decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁰ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹¹ This Department's rulings on matters of procedural compliance are final and nonappealable.¹²

Claudia T. Farr
Director

⁹ *Grievance Procedure Manual*, § 7.2(d).

¹⁰ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual*, § 7.3(a).

¹¹ *Id.* See also Va. Dept. of State Police vs. Barton, 39 Va. App. 439, 445, 573 S.E. 2d 319(2002).

¹² Va. Code § 2.2-1001 (5).